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THOMAS F. McDONALD

AMERICAN JUDICATURE SOCIETY
Ann Arbor, Michigan

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"The Next Things to Do"

By Carl B. Rix*

THE SCENE was a luncheon in a large room in the building of the supreme court in Washington. A remarkable gathering was present from all parts of the country; the director of the administrative office of the United States courts and his aides, judges, educators and lawyers, all devoted to one cause—improvements in the administration of justice. These men had a common purpose and they had met at that place because of that purpose. Mr. Henry Chandler, the director of the administrative office, reported on the work under his direction, the great gains under the new plan, the improvements in a great system of courts. Eminent judges and lawyers spoke briefly of work which had been done and of work which was being done. Justice Edward R. Finch, chief justice of the New York court of appeals, was called upon. Out of years of splendid accomplishment, of service as a leader in a great cause, he was entitled to speak of things which had been done. He said simply that he had been thinking "of the next things to do."

The Justice knew, because of the lasting work which he and his associates had done, of years of study and formulation of plans, of exchange of experiences and devotion to a cause, a mighty movement was under way in every part of his country. His vision made him speak only "of the next things to do."

The unattainable of years had been attained. The dreamed-of things were in actual practice. Solutions of new problems of administrative agencies were in process. Yet he could think only of the next things to do.

Complacency, self-sufficiency, indifference to existing conditions, tolerance of known abuses, had no place in the life of that eminent judge. He had shown by his life that he never shared in those. He was looking ahead—to "the next things to do."

In a world of war, of shifting concepts of government, of social obligations,

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it is inconceivable that our system of justice should not be affected by such forces. To meet them known abuses cannot be tolerated, known defects must be eradicated, known methods of improvement must be adopted and made to work.

In Mr. Frank Grinnell's recent article (Jud. Soc. Journal, February, 1941) is found this quotation from Justice Holmes:

"The glory of lawyers, like that of men of science, is more corporate than individual. Our labor is an endless organic process. The organism whose being is recorded and protected by the law is the undying body of society. When I hear that one of the builders has ceased his toil, I do not ask what statue he has placed upon some conspicuous pedestal, but I think of the mighty whole and say to myself, he has done his part to help."

All over the country, actuated by that purpose, lawyers are building improved structures like those in Arizona and Colorado; they are meeting the challenge to our institutions; they are meeting the simple commendation of the great Justice, "he has done his part to help."

To aid in that cause, to lead men on in every community, no matter how small a sphere, there is the inspiration of leaders like Chief Justice Finch, who can survey calmly "the next things to do."

Robert H. Jackson to Address Annual Meeting

The annual meeting of the American Judicature Society will be held on May 7, 1941, at the Mayflower Hotel, Washington, D. C., beginning promptly at nine o'clock in the morning, President David A. Simmons presiding. Attorney General Robert H. Jackson has consented to deliver the principal address, speaking on the problem of the Administration of Justice.

The annual meeting, as usual, will be held at a time when other activities of interest to the members are scheduled in Washington, including committee and section council meetings of the American Bar Association and the annual meeting of the American Law Institute. These several meetings are of considerable interest and importance to the legal profession and should attract a large attendance. On the day preceding the meeting of the Judicature Society, the American Law Institute has its opening session, with an address by its president, George Wharton Pepper. Chief Justice Charles Evans Hughes has been invited to speak.

A meeting of the Board of Directors of the Judicature Society for the election of officers and the consideration of all pending matters has been called by Chairman Thomas F. McDonald to be convened immediately after the annual meeting of the members.

A Court That Can't Be Duplicated

For most readers Chief Justice Bayes' article in this number concerning the origin and present services of the New York City special sessions court will seem sensational. It is strange indeed that a court established 197 years ago, when the city had a population less than 25,000, should still be functioning. Stranger still is the fact that the court has undergone very little change. The original act provided that three magistrates should serve together in every trial. That principle has been faithfully preserved. Almost incredible is the fact that this court, with jurisdiction in cases in which a penalty of three years confinement in prison exists, should never employ a jury.

There can be no like court established. The right to trial by jury is inviolable. But the unique quality of substituting three trained legal minds for twelve, or perhaps six, average lay minds, is not the court's only excellence. It

gains much by having its judges appointed by a conspicuous public officer, the mayor, and by providing for the judges a considerable measure of security of tenure. That the court has grown in public favor, as a powerful factor in law enforcement, is due in part to its reorganization in 1910, whereby it acquired a responsible executive head. It has the further advantage of an appellate department of its own. It is a closely knit, carefully managed, hard-working court, that might, at any previous time in more than a century, have been deprived of its most extraordinary feature by a constitutional amendment, if its mode of trying cases had offended either popular or official opinion.

Pretrial and the Appellate Courts

BY JAMES CRAIG PEACOCK*

A lawyer's mind naturally turns toward the trial court when mention is made of that fast growing and wholesome development of modern procedure commonly referred to as pretrial. There is at least one major respect, however, in which both the need and the possibilities of a similar procedure on appeal are perhaps even greater than in the trial court. That is the better definition of the issues presented for decision.

Few of us have probably ever stopped to realize how inadequate is our procedure for defining those issues, and how imperfect and fragmentary is the resulting statement of the issue in many important cases in the appellate courts. There is usually nothing corresponding to the pleadings which form so essential a part of both common law and code procedure. The issues on appeal are primarily questions of law and are often very different from the issues of fact formulated by the pleadings and on pretrial. And yet at no point along the line is there ordinarily any procedure intended or adapted to effect a corresponding definition of the precise points which are being taken up for decision by the higher court.

On the contrary the all too common practice is for the appellee's brief to almost deliberately restate and rearrange whatever statement of the question is presented in appellant's brief. In the absence of any procedure effectively discouraging such a course the inducement to restate the question in the form most favorable to appellee's position is obvious. (In only a very few jurisdictions is there even any rule similar to Rule 50 of the Supreme Court of Pennsylvania which requires a concise statement of the question by appellant and tends to discourage restatement by appellee except for good reason.)

Some time ago the writer checked back on this point in the fifteen most recent cases in his own docket in which he had represented the appellant. Those fifteen cases constituted a fairly representative cross-section of practice in this respect as they took him into the supreme court of the United States and five of the federal circuit courts of appeals, and the appellee's briefs bore the names of some thirty opposing counsel coming from almost as many states. In practically every one of the appellee's briefs the question as stated by appellant was completely restated *in new phraseology*. Nor was such restatement apparently due primarily to any inadequacy or other fault in the original statement. For in not a single instance was there any criticism, helpful or otherwise, of that statement, or any explanation as to why a restatement was desirable or necessary. In this latter connection the writer was gratified to find that a similar examination of the fifteen most recent cases in which he had represented the appellee showed that in only two instances had he restated the question without explaining why he had found it necessary to do so. It also showed several cases where the appellant's statement was seriously misleading or inadequate.

An inadequate or inexact defining of the issue in an appellate court carries with it the same long train of unhappy results as in a

*The author is a member of the Bar of the District of Columbia.

trial court. But in the appellate court there is often an additional consequence of an even more serious nature. The harm that may be done is not limited to the immediate parties to the case. In the trial court the brunt of those unhappy results falls primarily on the parties whose counsel—in theory at least—were presumably in large part responsible for the faulty presentation and for any consequent miscarriage of justice. But to a far greater extent the appellate court has the responsibility of announcing legal principles of general and far reaching application. Its opinions are reported and constitute precedents which may prove to be absolutely binding on many who had no chance to be represented when the decision was being formulated.

AN IMPRESSIVE INSTANCE OF BLUNDERING

The far reaching import of this aspect of the matter was most emphatically driven home to the writer some years ago in the course of preparation of a brief in a circuit court of appeals. The case turned on one of a number of specific questions which had arisen in a field where an earlier decision of the supreme court had come to be widely recognized and frequently cited as the leading case. The opinion of the supreme court abounded in concise and readily quotable categorical statements. Numerous other cases had in the meantime been disposed of by the courts and by administrative officials on the authority of one or another of those statements. Some were apparently integral parts of the decision, others were merely persuasive dicta, but all apparently hung together so well that the latter were generally considered as almost as authoritative as the former. The writer's case, however, was just enough different from the leading case that he was led into an intensive analysis of the latter, and what he found was most disillusioning. The whole fabric of the almost revered leading case had been builded on a foundation of sinking sands. The real issue had been so inadequately presented that he felt convinced that the court had completely misapprehended the whole setting of the case. In particular he is satisfied that more than one of those explicit rulings that studded the opinion and had been so vigorously applied to other entirely helpless parties would have been omitted or decided just the other way if the precise scope of the issue presented by the case had been more accurately defined.

Still another aspect of the matter is found in the almost cataclysmic changes in our economic and social structure which are paralleled by a steadily increasing and closely related complexity in the issues that are litigated. This is especially true with respect to cases which are important enough to be carried up on appeal. The judicial review of administrative orders is fast becoming one of the major branches of appellate jurisprudence. Modern social and regulatory legislation is creating a flood of litigation which abounds in complexities and difficulties unthought of a century ago. It is true that in the meanwhile substantial advances have been made in procedure, but they have had largely to do with the trial courts. Appellate procedure by and large is substantially little different now from what it was then—except perhaps it has even more pitfalls for the unwary if we may judge from the far too many cases still being digested under such headings as appeal and error.

It is not, however, the purpose of this article to enlarge upon the responsibilities of either the bar or the bench in this respect. Its scope is much more limited. A new tool has recently been developed which has proved very useful in the trial courts, and we turn to consider its possible utility in the appellate courts, having especially in mind conditions such as have been indicated in some of the preceding paragraphs.

The writer has no interest in advocating any hard and fast ready made rule for requiring all appellate cases to go through a rigid pretrial mill, or in wishing upon the profession any *a priori* or theoretical abstractions. Rather does he feel that we should profit by and build upon experience, and if to that end he starts the ball rolling by making available his own experience it is hoped that some almost unavoidable injection of the personal element will be permitted.

NEED FOR PRECISE ISSUE IS VITAL

A large part of his own contact with appellate courts has been in a field of law which involves review of administrative determination. In a surprisingly large proportion of such cases there is no single simple and controlling issue. Instead the issue is frequently a composite one combining a number of interrelated factors of greater or less importance. The presence or absence, or the greater or less

stressing, of any one of several factors may make all the difference in the world. Two apparently similar cases may very properly lead to or call for entirely different decisions. Conflicting or confusing opinions would many times have been avoided if at the very outset both counsel and the court had been forced to meet squarely the question as to just what factors really made up the issue. Nor should such an effort always be held within too conventional limits. It not infrequently happens—as illustrated in many notable decisions of the supreme court which have been announced by a divided court—that the outcome is entirely dependent upon the way in which the matter is approached. If approached from the standpoint of one school of thought there is one result. If approached from that of the contrary school of thought the result may be very different. In such cases both the presentation and the decision would often be greatly clarified, and the value of the latter as a precedent correspondingly enhanced, by frank recognition from the outset as to the real nature of the issue.

A SPECIFIC INSTANCE CITED

But to get back to something of perhaps more immediate appeal to a larger portion of the profession. Take for example a good old fashioned suit for damages for breach of contract. The writer was recently called into such a case after a very substantial verdict rendered by a district court jury at the end of a five weeks trial had been set aside by the circuit court of appeals, and the case sent back for a new trial. Preparation was being made for a pretrial conference which the trial judge had set down as a preliminary to the new trial. Days were spent in futile discussion of just what was the precise effect of various rulings embodied in the opinion of the circuit court of appeals, just as hours had to be similarly spent by the court and opposing counsel when the pretrial conference was eventually held. Reference to the lengthy briefs of the parties in the circuit court of appeals threw little light upon the matter. The case was an involved one and the parties had done the conventional thing of each stating the issues in its own way. If *before the briefs had been written* a judge of the court of appeals had been assigned to hold just such a conference as the trial judge did hold in preparation for the second trial, the future conduct of that case would have been tremendously simplified. Regardless of what might have been the outcome a tremendous saving in both money and time to both the parties would have been inevitable.

The writer, as he has already indicated, does not urge any appellate court to forthwith adopt a hard and fast rule requiring all cases to go through an additional procedure analogous to pretrial. Neither does he have any such ready made rule to suggest. He is convinced, however, that something of this sort would prove of inestimable value in an increasingly large proportion of the cases coming to our appellate courts.

If this brief article merely stimulates professional thinking on this subject, and elicits further expressions from others who are in a position to contribute something constructive along this line, it will have more than served its purpose. Perhaps it is not too much to hope that ere long some forward looking court will take the first step in exploring in an informal way the potentialities of pretrial—or shall we call it preargument—on appeal. Even if nothing more is accomplished than an agreement on the statement of the question *before either brief is written* such an assurance in every case that both arguments are directed to the same identical issue would in itself be a long step forward.

So called communism or socialism in the United States, except in a few isolated cases of professionals, is entirely a disease of the stomach and not of the mind or the heart. If we promote quicker adjudication of human rights there will be fewer bellyaches.—*William E. Riley, Indianapolis.*

Liberal Trend as to State Appeals*

BY EDWARD D. RANSOM†

Developing as a result of a period when an accused person was placed at a tremendous disadvantage at the hands of tyrannical judges exercising an unconscionable abuse of power, the concept that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb" was put into the fifth amendment of the federal constitution and into many of the state constitutions. As a part of this double jeopardy concept, the American courts, from the first, established the rule that the state should not be allowed to appeal in a criminal prosecution. The accused, rather than being imposed upon, was granted many other aids and safeguards. But in recent years there has been a reaction against the idea that the punishment of crime is a sort of invasion of natural right, and, a realization that, as Holmes put it,[1] "at the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny."

Various states have, by statutes ingrafting exceptions, attempted to relax the strict rule against state appeals in criminal cases. The statutes have been attacked either by claim of protection under state constitutions, or under guarantees in the federal constitution.

I.

At common law neither the state nor the defendant is allowed an appeal in a criminal case;[2] hence, to have any appeal there must be a statute specifically authorizing it.[3] The statutes and decisions of the various states cover a wide range. In Connecticut, by statute, the state is permitted to take appeals upon all questions of law arising on the trial of a criminal case in the same manner and to the same effect as if taken by the accused;[4] and it is held that the state, even after acquittal, is authorized to appeal and, in case of reversal, to bring the defendant again into court for a new trial.[5] In Illinois,[6] Massachusetts,[7] Minnesota,[8] and Texas,[9] the state cannot appeal under any conditions or circumstances. Between these two extremes is a large variety of situations wherein the state has been authorized to appeal. The most common of these are cases where the appeal is based upon order setting aside or quashing an indictment or information, or on an order sustaining a demurrer to an indictment or information, or an order arresting judgment, or an order granting a new trial.[10]

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*This article first appeared in Michigan Law Review, vol. 37, p. 103 (1939). Thanks are due the Editor of the Law Review for the privilege of republishing, and to the Author for a needed revision of his text.

†Of the law firm of Lillick, Geary, Olson and Charles, San Francisco and Los Angeles.

1. Dissenting opinion in Kepner v. United States, 195 U S. 100 at 134, 24 S. Ct. 797 (1904).

2. 1 Bishop, Criminal Law, 9th ed., 757 (1923); Brennan, "The Right of the State to Appellate Review in Criminal Cases," 1 Ohio St. Univ. L. J. 93 at 94 (1935); 38 Dick. L. Rev. 129 (1934); 92 A. L. R. 1137 (1934); 17 C. J. 41 (1919).

3. State v. Felch, 92 Vt. 477, 105 A. 23 (1918), noted 28 Yale L. J. 408 (1919); State v. B'Gos, 175 Ga. 627, 165 S. E. 566 (1932), noted in 81 Univ. Pa. L. Rev. 340 (1933); United States v. Sanges, 144 U. S. 310, 12 S. Ct. 609 (1891). In State v. Muolo, 118 Conn. 373, 172 A. 875 (1934), the court seems to have allowed the state to appeal in a situation not specifically covered by statute. Noted in 4 Ford L. Rev. 130 (1935).

4. Conn. Gen. Stat. (1930), § 6494.

5. State v. Lee, 65 Conn. 265, 30 A. 110 (1894).

6. Ill. Rev. Stat. (1931), c. 38 § 747; People v. John York Co., 80 Ill. App. 162 at 163 1898). The statute was modified, however, by a 1933 amendment, Ill. Rev. Stat. (1937), c 38, § 747, which allowed the state to appeal from an order or judgment setting aside or quashing an indictment.

7. Commonwealth v. Cummings, 3 Cush. (57 Mass.) 212 (1849).

8. State v. McGrorty, 2 Minn. 224 (1858); State v. Johnson, 146 Minn. 468, 147 N. W. 657 (1920); State v. Wellman, 143 Minn. 488, 173 N. W. 574 (1919).

9. Prescott v. State, 52 Tex. Cr. App. 35, 105 S. W. 192 (1907).

10. According to a comment in 10 N. Y. Univ. L. Q. Rev. 373 at 376 (1933) statutes in twenty-one states allow appeals by the state in one or all of these situations. For further analysis of the statutes and decisions wherein the state has been permitted to appeal, see Miller, "Appeals by the State in Criminal Cases," 36 Yale L. J. 486 (1927); 38 Dick. L. Rev. 129 (1934); 27 J. Crim. L. 917 (1937); 17 C. J. 41 ff. (1919); Am. L. Inst., Code of Criminal Procedure (proposed final draft), § 445 and commentary p. 494 (1930).

The courts have often been very strict in their interpretation of these statutes. In a recent case, People v. Reed, 276 N. Y. 5, 11 N. E. (2d) 330 (1937), the defendants were indicted under an act making certain types

In the few states that have no constitutional provision regarding double jeopardy,[11] there is no valid objection, under state law, to statutes giving the state a right of appeal. Where such a constitutional provision is present, the dispute is as to just what the double jeopardy provision forbids. One of the chief issues on which the courts divide is whether the constitutional provision forbids only a trial in a new and independent cause, or also forbids a new trial in the same cause. The great majority of the cases take the latter view.[12] In most of the instances enumerated above and in others where the state has been allowed to appeal, it is on the theory that a second, or even a first, jeopardy has not arisen since the question of double jeopardy is usually said to arise only when the state is permitted an appeal after an acquittal.[13] There is, however, disagreement as to what amounts to an acquittal.[14] The real difficulty is in the construction of the meaning of double jeopardy in these state constitutions. Applying orthodox rules of construction, what constitutes "jeopardy" would be determined by practice and the common law at the time the constitution was adopted.[15] But since state appeals were probably unknown when most of the state constitutions came into being, the framers most likely were not concerned with this branch of double jeopardy. A conjecture as to what the framers would have intended had they thought of it leads, naturally, to a determination of what today would be the most desirable, and hence partially accounts for the expansion of the use of state appeals.

II.

Several provisions of the federal constitution have been asserted as standing in the way of appeals by the state. The double jeopardy clause of the Fifth Amendment has been held to prohibit appeals by the government in federal courts.[16] While it has been contended that this clause should be a limitation on state action, it is now well settled that the provisions of the first eight amendments are restrictions on the national government only.[17]

The assertion that the privileges and immunities clause of the fourteenth amendment[18] operates as a restriction on state appeals is not as easily disposed of. A definite limitation was first put on this clause in the *Slaughter House Cases*,[19] where it was said that the privileges

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of gambling a crime except when another penalty is prescribed by law. Defendants immediately moved to dismiss. The trial court dismissed the indictment on an erroneous ruling that another penalty was provided by law. The state appealed from this ruling. The appeal was dismissed by the Appellate Division, which was affirmed by the Court of Appeals. The latter court said that if the case had gone to trial and the defendants had, by writing, filed in the court a demurrer to the indictment, there could be a valid appeal by the state to the judge's ruling, but even though the ruling on the motion to dismiss was for all purposes the same, although not in writing, the statute did not permit an appeal by the state in this situation and to do so would be to place the defendant in double jeopardy. A part of the statute which stated that in all cases where an appeal to an appellate court may be taken by the defendant, *except* where a verdict or judgment of not guilty has been rendered, an appeal may be had by the people, was interpreted as being meaningless since the only time the defendant was said to have an appeal is after a verdict or judgment. It would seem that the legislature would not have done a futile thing, and, as the district attorney suggested, may have intended to give the people the right to appeal from any ruling dismissing the indictment or ending the case, which did not result from a verdict of acquittal.

11. At least five states, Connecticut, Maryland, Massachusetts, North Carolina and Vermont, have no double jeopardy clauses in their constitutions. See, State v. Palko, 122 Conn. 529, 191 A. 320 (1937); Commonwealth v. Perrow, 124 Va. 805, 97 S. E. 820 (1919); Livingstone, "Twice in Jeopardy," 6 Green Bag 373 (1894); 27 J. Crim. L. 917 at 919 (1937).

12. Ex parte Lange, 18 Wall. (85 U. S.) 163, 21 L. Ed. 872 (1873); Kepner v. United States, 195 U. S. 100, 24 S. Ct. 797 (1904); Commonwealth v. Simpson, 310 Pa. 380, 165 A. 498 (1933); State v. Taylor, 180 Ark. 588, 22 S. W. (2d) 34 (1929). The contrary argument was expressed in Holmes' dissent to Kepner v. United States, supra, and in State v. Lee, 65 Conn. 265, 30 A. 1110 (1894).

13. Murray v. State, 210 Ala. 603, 98 So. 871 (1924); Ex parte Bornee, 76 W. Va. 360, 85 S. E. 529 (1915); State v. Miller, 14 Ariz. 440, 130 P. 891 (1913). An admirable discussion of what has and has not been considered to be double jeopardy under statutes authorizing state appeals is presented in 10 N. Y. Univ. L. Q. Rev. 373 (1933).

14. For example, it has been held that, when a jury has been properly sworn and trial started, if the judge without necessity and without the consent of the accused dismisses the jury before verdict, such action amounts to an acquittal and plea of double jeopardy will be sustained. Ex parte Ulrich, (D. C. Mo. 1890) 42 F. 587; Mitchell v. State, 42 Ohio St. 383 (1884). But the contrary was asserted by Story in United States v. Perez, 9 Wheat. (22 U. S.) 579, 6 L. Ed. 165 (1824).

15. 2 Willoughby, Constitutional Law, 2d ed., 1160 (1929); Commonwealth v. Fitzpatrick, 121 Pa. 109, 15 A. 466 (1888); People v. Webb, 38 Cal. 467 (1869).

16. Kepner v. United States, 195 U. S. 100, 24 S. Ct. 797 (1904).

17. Barron v. Baltimore, 7 Pet. (32 U. S.) 242, 8 L. Ed. 672 (1833); Commonwealth v. Perrow, 124 Va. 805, 97 S. E. 820 (1919); Ex parte Ulrich, (D. C. Mo. 1890) 42 F. 587.

18. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." [§ 1, cl. 2].

19. 16 Wall. (83 U. S.) 36 (1873).

and immunities of the fourteenth amendment referred to such privileges of a United States citizen as "owe their existence to the federal government, its national character, its constitution or its laws." This interpretation practically nullified the utility of the clause, since article VI of the constitution already protected from state abridgment rights derived from these sources.[20] A strong dissent in this and other cases maintained that the privileges and immunities guaranteed against state abridgment under the fourteenth amendment were those "fundamental rights which belong to citizens of all free governments."[21] This contention being denied, a further argument was advanced that, while the first eight amendments, as limitations on power, apply only to the federal government and not to the states, yet so far as they declare or recognize fundamental, common-law rights of persons, these rights are theirs as citizens of the United States, and that the fourteenth amendment was intended to protect, at least, these rights from state abridgment.[22] Justice Harlan in a dissenting opinion[23] specifically designated the exemption from being put twice in jeopardy of life or limb for the same offense as one immunity that the fourteenth amendment must have included. The contention was flatly disposed of in *Maxwell v. Dow*,[24] in which the court stated that the privileges and immunities under the fourteenth amendment are those which attach to a person *exclusively* as a United States citizen and specifically held that neither the fourth, fifth, nor sixth amendments granted rights which were of that character. These decisions precluded an attack on state appeals under this clause of the constitution.

In a recent case, *Colgate v. Harvey*,[25] the court for the first time declared a state statute unconstitutional under this clause and protected a specific "natural" right, namely, the privilege of transacting business across state lines. This was an indication that the court might be adopting a fundamental rights theory in interpreting the privileges and immunities clause of the fourteenth amendment.[26] If that were so there would seem to be opened up a possible attack through this clause on legislation permitting state appeals. But such an attack was attempted in a subsequent case[27] in the supreme court, and dismissed with a citation of Maxwell v. Dow, the court making no mention of Colgate v. Harvey. Furthermore Colgate v. Harvey was expressly overruled in Madden v. Kentucky[28] although that decision does not clearly indicate whether the court is merely holding that transaction of interstate business is not a privilege of a United States citizen or is reverting to the earlier narrow interpretation of Maxwell v. Dow.[29]

III

May the due process clause of the fourteenth amendment be invoked as a weapon in an attack on allowing the state to appeal in a criminal prosecution? The problem is particularly important to the criminal defenders in those states

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20. Article VI (2): "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made, under authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution of laws of any State to the contrary notwithstanding."

21. Field, J., in dissent to the Slaughter House Cases, 16 Wall. (83 U. S.) 36 (1873). Also Bartemeyer v. Iowa, 14 Wall. (81 U. S.) 129 (1873); Butcher's Union v. Crescent City, 111 U. S. 746, 4 S. Ct. 652 (1884); Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14 (1908). For a discussion of the development of the Court's interpretation of the privileges and immunities clause of the Fourteenth Amendment, see Warren, "The New Liberty under the Fourteenth Amendment," 39 Harv. L. Rev., 431 at 436 ff. (1926).

22. This argument appears to have been first advanced in Spies v. Illinois, 123 U. S. 131 (1887), but the Court, deeming it not necessary to the decision of the case, declined to consider it. In Guthrie, Lectures on the Fourteenth Amendment 61 (1898), the author, having examined the reports and papers of the framers of this amendment, concludes, "it would seem to be entirely clear that the intention was that the essential rights of life, liberty, and property distinctly recognized in the Constitution and in the first eight amendments should, by the Fourteenth Amendment, be made the indisputable and secure possession of every citizen of the United States beyond the power of any state to abridge."

23. Twining v. New Jersey, 211 U. S. 78 at 117, 29 S. Ct. 14 (1908).

24. 176 U. S. 581, 20 S. Ct. 448 (1900).

25. 296 U. S. 404, 56 S. Ct. 252 (1935). The right protected was the right of a citizen of the United States to transact business in other states without interference by the state of his residence. See particularly the dissenting opinion of Justice Stone, 296 U. S. at 445, where he points out that the majority is departing from their previous holding. It is difficult, however, to ascertain the precise purport of this decision.

26. See 24 Cal. L. Rev. 728 (1936); Dodd, Cases on Constitutional Law, 2d ed., 871, note (1937), for discussion of this point.

27. Palko v. State, 302 U. S. 319 at 327, 58 S. Ct. 149 (1937).

28. 60 Sup. Ct. 406 (1940).

29. See comment, 28 Calif. Law Rev. 388 (1940).

which have no constitutional provision regarding double jeopardy.[30] There are several standard methods of approach used to ascertain whether a given right may be protected against state action under the due process clause.

One of the tests most frequently resorted to in determining the content of this clause is to ascertain whether the matter at hand is one of "those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."[31] Undoubtedly the rule against double jeopardy was a well recognized doctrine of ancient common law, was part of the Magna Charta,[32] and was "acted on" by the state and federal governments, hence meeting the historical test. The rule that the state may not appeal in a criminal prosecution, however, was formulated as a part of the principle of double jeopardy for the first time by American courts. This historical test is not to be resorted to as conclusive, and if the procedure is necessary to provide protection to the state and society its novelty will not vitiate it.[33]

Another method used to ascertain the content of the due process clause is to apply a comparative test. The argument is that the restraints imposed by the due process of the fifth and fourteenth amendments are identical; that the fifth amendment does not include any of the guarantees specifically enumerated in the first eight amendments, since the constitution is not to be construed as redundant and repetitous; hence the fourteenth amendment does not contain these guarantees either. This argument was used by the supreme court in *Hurtado v. California* in determining that the institution of grand jury was not an essential element of due process in the fourteenth amendment[34] and its application would also exclude double jeopardy from the protection of that clause. The court, however, has not adhered to this limited use of due process which it had earlier stated; it has come to view the character of the right, without regard to specific mention in the constitution, as determinative of the content of due process, and in recent years has held freedom of religion,[35] speech,[36] press[37] and assembly[38] all of which are rights enumerated in the first eight amendments, to be within the protection of the fourteenth amendment.[39] It has been conjectured[40] that if the supreme court continues its present expansion of the due process clause, every one of the rights which are guaranteed by the bill of rights (which, of course, would include the principle of double jeopardy) will be protected from deprivation by the state without due process.

Whether we consider the right of freedom from state appeals in a criminal prosecution as part of substantive due process under "liberty," or as purely procedural due process, the final test in ascertaining whether the right falls within the protection of the due process clause is whether abolition of the right violates a principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental.[41] The test of fundamental rights is an approach more commensurate with the usual judicial thought processes than is any test of mere application of mechanical rules of construction. Through this test and by the process of judicial inclusion and exclusion of

30. See note 11, supra.

31. Twining v. New Jersey, 211 U. S. 78 at 100, 29 S. Ct. 14 (1908). Due process is said to be the same as "law of the land" in Magna Charta. Hurtado v. California, 110 U. S. 516 at 545, 4 S. Ct. 111 (1884).

32. State v. Felch, 92 Vt. 477, 105 A. 23 (1918); Ex parte Ulrich, (D. C. Mo. 1890) 42 F. 587; Ex parte Lange, 18 Wall. (85 U. S.) 163; 21 L. Ed. 872 (1873).

33. 3 Willoughby, Constitutional Law, 2d ed., 1707 (1929).

34. 110 U. S. 516 at 534, 4 S. Ct. 111 (1884).

35. Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571 (1924); Hamilton v. Regents of University, 293 U. S. 245, 55 S. Ct. 197 (1934).

36. Herndon v. Lowry, 301 U. S. 242 at 259, 57 S. Ct. 732 (1937); De Jonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255 (1937).

37. Grosjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 444 (1936); Gitlow v. United States, 268 U. S. 652, 45 S. Ct. 625 (1925).

38. De Jonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255 (1937).

39. A complete discussion of this subject may be found in Warren, "The New Liberty Under the Fourteenth Amendment," 39 Harv. L. Rev. 431 (1926). See also 21 J. Crim. L. 618 (1931); 32 Col. L. Rev. 1430 (1932); 31 Mich. L. Rev. 245 (1933); 35 Mich. L. Rev. 1373 (1937).

40. Warren, "The New Liberty Under the Fourteenth Amendment," 39 Harv. L. Rev. 431 at 460 (1926). For other expressions of the fundamental right test, see 3 Willoughby, Constitutional Law, 2d ed., 1707 (1929); Taylor & Marshall v. Beckman, 178 U. S. 548 at 602, 20 S. Ct. 890 (1900); Hebert v. Louisiana, 272 U. S. 312 at 316, 47 S. Ct. 103 (1926); Powell v. Alabama, 287 U. S. 45 at 68, 53 S. Ct. 55 (1932).

41. Hebert v. Louisiana, 272 U. S. 312, 47 S. Ct. 103, 48 A. L. R. 1102 at 1106 (1926).

particular rights, a body of fundamental rights may be built up which give a real content to the due process clause. The approach is similar to that applied in determining the use of the privileges and immunities clause by Justice Field in his dissenting opinion to the *Slaughter House Cases*.[42] There is a distinction, however between the protection given by the privileges and immunities clause and that given by the due process clause. In the former, if a fundamental right is said to come under it, the state is ipso facto precluded from abridging it; in the latter, it may still be abridged if to do so is not an unreasonable deprivation.[43]

Where the issue has been presented, the courts have not agreed whether the right to be free from state appeals and double jeopardy is one of the fundamental rights. In two early federal cases,[44] the question whether freedom from double jeopardy was a fundamental right to be protected by the due process clause of the fourteenth amendment arose but not through the issue of state appeals. Both courts emphatically stated that such right is one of those fundamental rights safeguarded by this clause in the constitution. In *State v. Lee*,[45] an early Connecticut case, the question whether immunity from state appeals in a criminal prosecution as part of double jeopardy was such a fundamental right as to be under the protection of the due process clause was squarely presented to the court and, in a well reasoned opinion, it was held that the "natural rights of the individual" and the "essential principles of jurisprudence" are most accurately followed when the controversy is finally settled in accordance with the law after both sides have been given the opportunity to appeal for errors. The same issue was before a Vermont court,[46] which refused to enumerate or attempt to define just what fundamental rights are, but decided that "relief from the vexations of a second trial is not one."

Thirty-five years ago the question was raised before the supreme court for the first time.[47] The court did not consider it since it was not necessary to the decision. Recently the issue was squarely before the court in *Palko v. State*.[48] In that case the defendant was convicted of murder in the second degree. The state of Connecticut appealed in the manner provided by a statute.[49] The appellate court reversed the judgment, ordering a new trial. In the second trial the defendant was convicted of murder in the first degree. There being no double jeopardy provision in the state constitution on which to rely, defendant appealed on the ground that the statute authorizing the state to appeal constituted a denial of due process. The court used the test of fundamental rights, after a careful examination of those things which have and have not been held to be "fundamental," but made no mention of the early lower federal court decisions which had held that double jeopardy was a fundamental right; it decided that, at least, the kind of double jeopardy to which the statute had subjected the defendant here was not a "hardship so acute and shocking that our polity will not endure it," and was not a denial of due process.

42. 16 Wall. (83 U. S.) 36 at 95 ff. (1872).

43. The distinction is not so apparent in due process as applied to procedure as it is as affecting property rights. In the former, the guarantee is said to be not so much that a certain result has been obtained as that it has been reached in a fair way. See Snyder v. Massachusetts, 291 U. S. 97, 54 S. Ct. 330, 90 A. L. R. 575 at 596 (1931).

44. Ex parte Ulrich, (D. C. Mo. 1890) 42 F. 587 (judge improperly adjourned the case in the middle of the trial, thus acquitting the defendant, who raised the double jeopardy plea on the new trial); In re Bennett, (D. C. Cal. 1897) 84 F. 324. In the latter case the defendant was first tried on charge of assault with attempt to commit murder, and found guilty of assault with deadly weapon. A plea of double jeopardy was interposed when, after granting defendant a new trial, the trial again proceeded on the charge of assault with attempt to commit murder. The court said, 84 F. at 326, "The right of a person, after acquittal by a jury to be exempt from the jeopardy of being again placed on trial in the same court, and upon the same indictment, for the identical offense of which he has been acquitted, is certainly one of the fundamental rights which has always been recognized by our system of jurisprudence as belonging to the citizen; and, unquestionably, the guarantee of due process found in the Fourteenth Amendment to the Constitution of the United States was intended, among other things, to secure to the citizen this right."

45. 65 Conn. 265, 30 A. 1110 (1894). See 19 L. R. A. 342 (1893).

46. State v. Felch, 92 Vt. 477, 105 A. 23 (1918).

47. Dryer v. Illinois, 187 U. S. 71 at 85, 23 S. Ct. 28 (1905).

48. 302 U. S. 319 at 328, 58 S. Ct. 149 (1937).

49. Conn. Gen. Stats. (1930), § 6494: "Appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

It has been held that such things as freedom of speech, press, and assembly,[50] the right to be represented by adequate counsel,[51] the right not to be convicted on confessions procured by torture,[52] and the right to have a proceeding free from fraud,[53] partiality,[54] and mob domination[55] all are fundamental rights protected by the due process clause. On the other hand, the rights to a grand jury indictment,[56] to accompany the jury to the scene of the crime,[57] or even to have a trial by jury[58] have been held not to be within the protection of this clause. It would seem that the division is a proper one. That the former group are either essential substantive rights, or rights which are absolutely necessary to a fair and adequate judicial trial, seems self-evident. The immunity from prosecution except as a result of indictment and the right to trial by jury are certainly very important. But the process of prosecution by information adequately supplants the former; and few would any longer maintain that a fair and enlightened system of justice could not be carried on without the use of jury trial. Freedom from state appeals in criminal cases is surely no more fundamental than jury trial and the right of indictment.

A double jeopardy arising as the result of a new case being brought on the same matter, after an acquittal on an original trial free from error, would, it would seem, be shocking to our sense of justice and, as those early federal cases held, be a deprivation of a fundamental right. But an immunity from a state appeal because of some error in the trial or in some preliminary ruling by the court does not seem to be the very essence of a scheme of ordered justice. A close examination will show that more good than harm would come from allowing the state to appeal because of error in any stage of proceedings.

The restraint on the right of the state to have an equal opportunity with the defendant to appeal has a demoralizing effect on all the parties concerned. The defense attorney is permitted nearly absolute freedom in what he may say or do. If he asks improper questions or makes improper remarks, the state is not said to be prejudiced. The prosecutor, on the other hand, must move cautiously else some slip will be seized upon as error reviewable by an appellate court. The judge is also placed in an uncomfortable position. No judge wants to be reversed. He will be inclined to give all the instructions offered by the defense and will, naturally, be very lenient in his rulings for the defendant so as not to commit reversible error. But since he cannot be reversed in his rulings as to the prosecution, he will probably make up for his leniency to the other side.[59]

Is a right which brings about such an unbalanced and demoralized system of justice as this " a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental?" By refusing it would we violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?" In short, is the right to be free from an appeal by the state in a criminal prosecution a fundamental right to be protected from abridgment by the states under the due process clause of the fourteenth amendment? It is submitted that the supreme court reached the correct result in answering the question in the negative. Relaxation of the strict rule against state appeals in criminal prosecutions is but a part of an awakened administration of criminal law which has as its end the apprehension and conviction of criminals rather than their protection. Criminal defenders should not be permitted to interfere with this effort by using the due process clause as a weapon against it.

50. Supra, notes 34, 35, and 36.

51. Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 (1932), discussed 31 Mich. L. Rev. 245 at 252 (1933).

52. Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461 (1936), noted 12 Ind. L. J. 66 (1936).

53. 3 Willoughby, Constitutional Law, 2d ed., 1713 (1929).

54. 3 ibid., 1713; Berger v. United States, 255 U. S. 22, 41 S. Ct. 1230 (1920).

55. Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461 (1936).

56. Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111 (1884); Gaines v. Washington, 277 U. S. 81, 48 S. Ct. 468 (1928).

57. Snyder v. Massachusetts, 291 U. S. 97, 54 S. Ct. 330 (1931).

58. Maxwell v. Dow, 176 U. S. 581, 20 S. Ct. 448 (1900); New York Cent. R. R. v. White, 243 U. S. 188 at 208, 37 S. Ct. 247 (1916); Frank v. Mangum, 237 U. S. 309 at 340, 35 S. Ct. 582 (1914).

59. These and other evils from the prevention of state appeals are fully discussed in Miller, "Appeals by the State in Criminal Cases," 36 Yale L. J. 486 (1927); Brennan, "The Right of the State to Appellate Review in Criminal Cases," 1 Ohio St. Univ. L. J. 93 (1935); Horack, "Prosecution Appeals in West Virginia," 41 W. Va. L. Q. 50 (1934).

Criminal Cases Tried to a Bench of Three Judges

High Efficiency in Metropolitan Court

BY WILLIAM R. BAYES, C.J.*

"MANY persons have advocated the use of benches of three, sitting without a jury for the trial of civil cases. Certainly such plan merits investigation, for if a bench of three can successfully be employed in cases where personal liberty is at stake, it would not seem unreasonable to extend it in the field where the mere award of damages is involved."

THE COURT OF SPECIAL SESSIONS was first established in the Colony of New York by acts passed by the Colonial legislature in 1744 (3 Col. Laws, p. 377, chap. 766). The court consisted of a three-judge bench. Its jurisdiction over offenses classified as misdemeanors is very broad owing to the fact that an indeterminate sentence of three years of imprisonment may be imposed.

At the outset the court was composed of the "mayor, deputy mayor, recorder and alderman or any three of them," whereof the mayor, deputy mayor or recorder should be one. From time to time there were various legislative changes as to the make-up of the three-man bench but at no time was the number of judges reduced below three.

From the beginning and through the history of the court to the present time there have not been jury trials in the court of Special Sessions of the city of New York. This has been sustained by the court of Appeals of our state upon the ground that, since the court was established prior to the adoption of the constitution of the United States and the constitution of the state of New York it does not violate the guaranty under either constitution of the right of trial by jury.[1] Article 1, Sec. 2, of the New York State constitution provides in part as follows: "Trial by jury in all cases *in which it has heretofore been guaranteed* by constitutional provision shall remain inviolate forever . . ." Manifestly since the right of trial by jury had not "heretofore been guaranteed by constitutional provision" the way was open to continue trials of crimes of the grade of misdemeanor in the court of Special Sessions of the City of New York without juries.

There is no other court in the state of New York possessing the attributes of the court of Special Sessions of the city of New York. Courts of Special Sessions outside the City of New York are not composed of three justices but of one only, and the defendant may demand a jury trial (Sec. 702, Code of Criminal Procedure).

The courts of Special Sessions throughout the state enjoy substantially the same jurisdiction as the court of Special Sessions of the city of New York, with the proviso however that the defendant may demand trial before a jury of six. Moreover, those courts do not have appellate jurisdiction nor jurisdiction to try paternity cases.

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*The author is chief justice of the Court of Special Sessions which has jurisdiction in important criminal cases throughout the entire City of New York.

1. The most satisfactory case sustaining the Court of Special Sessions in its freedom from jury trial is:
People ex rel Frank vs. McCann, 253 N. Y. 221.
Other cases in the Court of Appeals are:
People ex rel Murray vs. Justices, 74 N. Y. 406;
People vs. Kaminsky, 208 N. Y. 389;
People vs. Bellinger, 269 N. Y. 265.

Since Jan. 1, 1926 the constitution has expressly permitted the legislature to authorize courts of special session and inferior local courts to try misdemeanor cases without a jury. Sec. 18, Art. 6 of the constitution reads as follows: ". . . courts of special sessions and inferior local courts of similar character shall have such jurisdiction of the grade of misdemeanors as may be prescribed by law, and the legislature may authorize them to try such offenses without a jury."

The court of Special Sessions as now organized is governed by Chapter 659 of the Laws of 1910. It is at present composed of a chief justice and fifteen associate justices who are appointed by the mayor for terms of ten years. To quality for appointment to the bench one must have been a member of the bar for at least ten years.

At the present time the court sits in trial parts in all counties, with three justices assigned to each part.—In New York County are parts I and VI, the former handling shorter and the latter longer cases. In Kings County is part II, in Queens County part III, in Bronx county part V, and in Richmond County part IV.

There are also two extra parts in New York County and one extra part in Kings County for special cases. In New York and Kings Counties the sessions are daily from Monday to Friday, both inclusive. In Queens County the sessions are on Mondays and Thursdays, in Bronx County on Tuesdays and Fridays, and in Richmond County on Wednesdays. The Bench assigned to Queens, Bronx and Richmond counties is known as the circuit bench. There is also an appellate part of the court comprised of three justices, which hears appeals from the magistrates' courts in all five counties of the Greater City. This part sits in alternate weeks in the first judicial district which includes the counties of New York and the Bronx, and in the second judicial district which includes the counties of Kings, Queens and Richmond.

Some idea of the volume of work of the court may be gained by reference to the year 1939, during which there were 29,114 dispositions in all five counties. Of this number 14,239 arose under certain provisions of the law relating to some form of gambling, and 14,875 under other provisions of the law. During the year the Court conducted 7,126 trials resulting in 3,551 convictions and 3,575 acquittals. There were 16,193 pleas of guilty.

As to the character of the work it may be noted that the cases fall under various provisions of the penal law and the code of criminal procedure. Some cases require but a short time for trial, such as assault third degree, bookmaking and policy. Others require considerable time on account of the seriousness of the charges and their importance from the standpoint of the public weal.

The most important cases tried by the court are those based upon charges of larceny, unlawful entry, assault, illegal possession of weapons, drug addiction, impairing the morals of minors, indecent exposure, conspiracy, perjury, violations of the labor law, the workmen's compensation law, false financial statements, commercial frauds, usuary and the unlawful practice of medicine. A few concrete illustrations of actual cases may be illuminating.

Special Fields of Jurisdiction

In one case several defendants were charged with conspiring together to apportion amongst themselves, by means of non competitive bidding, certain building construction contracts upon such a basis that they would be shared by those participating in the conspiracy or arrangement. It was further charged that the defendants conspired together to evade the provisions of the minimum wage law. The scheme as alleged included the use of gangsters to intimidate and remove pickets assigned to duty by certain labor unions.

There are also provisions of the penal law making it unlawful for a person, whether an attorney or layman, to solicit legal business. These provisions are designed to prevent the practice of ambulance chasing in connection with cases wherein the action is based upon negligence resulting in personal injuries. Convictions in cases of this sort usually result in sending the leaders to the penitentiary. These prosecutions have resulted in a great reduction, if not in the practical elimination of that practice.

The court has also tried a number of cases in which the defendants were charged with making loans at usurious rates. In a city of the size of New York such loans frequently result in untold hardship involving, as they oftimes do, agreements and consents to the entry of judgment in the event of a default in the payment of installments. The court has imposed severe sentences in cases of this type and has, it is believed, greatly diminished the temptation to take advantage of the financial necessities of the unfortunate and helpless. In one case the prosecution resulted in the refunding of about $250,000 to a large number of victimized persons, most of whom were in poor circumstances.

A case of considerable interest related to the

so-called bakery racket. It was charged that a number of substantial baking concerns who had their own mutual welfare organizations were imposed upon by certain outside racketeers who by gaining control of the organization resorted to methods of gangsterism and terrorism in connection with efforts to maintain uniform prices. It is needless to say that the various bakery firms were practically helpless in this state of affairs until vigorously proceeded against by the district attorney.

It is an error to suppose that hardened criminals do not reach the court of Special Sessions. It frequently turns out that a defendant charged with unlawful entry, who has gained access to the roof of an apartment house without actually entering an apartment, has a long record of convictions for burglaries. The same situation often develops where a defendant is arrested and charged with the possession of burglar's tools.

PUNISHMENT FOR PERJURY

One of the principal complaints so often expressed by judges and the public at large as well as by the press relates to the crime of perjury or false swearing. Manifestly if in a given case the evidence given by persons testifying truthfully is overcome by that of persons testifying falsely an outrageous act has been committed which calls for repressive measures. The penal law defines two degrees of perjury—first degree wherein a person testifies falsely to a material matter in a civil or criminal action; and second degree, wherein a person testifies falsely under circumstances not amounting to perjury in the first degree. The effect of these definitions is to make it perjury in the second degree where it is not shown that the false swearing relates to a material matter. Perjury in the first degree is a felony and punishable by imprisonment in state prison up to five years or by a fine up to $5,000 or both. Perjury in the second degree is a misdemeanor and punishable by imprisonment for not more than one year or by a fine of not more than $500, or both. Experience has shown that juries are slow to convict of perjury in the first degree, no doubt influenced by the severity of the punishment. It frequently happens that the grand jury under appropriate provisions of the law reduces the charge of perjury from a felony to a misdemeanor and transmits it to Special Sessions for trial as a crime of the grade of misdemeanor. If progress is to be made in the reduction, or preferably the elimination, of perjury from our courts it will no doubt come about through the administration of adequate punishment to persons found guilty of the crime.

One of the most important provisions of the penal law, so far as the court of Special Sessions is concerned, is that relating to conspiracy. Section 580, among other things, makes it a crime of the grade of misdemeanor where two or more persons conspire to commit a crime or to prevent another from exercising a lawful trade or calling, or to commit an act injurious to the public health or public morals. These provisions are quite broad and open the way for the prosecution in the court of Special Sessions of defendants accused of participating in unlawful joint enterprises. The following have been prosecuted in this court: an attorney charged with conspiring to defraud an insurance company, a person charged with procuring an audit or fictitious claims for the purpose of defrauding a municipality, another for contriving a lottery or keeping a place for the playing of policy, a group of persons for bringing about a labor strike for unlawful purposes, other defendants for conspiring to violate the labor law governing wages and hours on public works, and a number of individuals for conspiring by means of an organization formed to prevent price competition as a result of which the price of material was unlawfully raised. It is apparent that the provisions making it unlawful to conspire to commit a crime are broad enough to reach a wide variety of criminal misconduct of which but a few examples are cited above.

It is generally recognized that the protection and conservation of the public health is a matter of supreme importance. There is a provision in the New York state education law which confers upon the court of Special Sessions jurisdiction to try persons accused of illegally or unlawfully practicing medicine. A person found guilty of such unlawful practice may be sentenced to imprisonment for a substantial term or in the alternative fined. Prosecutions under this provision of the law have resulted in uncovering many instances of unlicensed individuals holding themselves out as being members of the medical profession and qualified to diag-

nose and treat various diseases and ailments. In the city of New York it is possible for such individuals so to advertise as to bring to them many unfortunate and suffering people from whom substantial sums of money are at times exacted for treatments having little or no merit.

Several months ago Mayor LaGuardia appointed a committee, known as the mayor's committee, for the study of sex offenses. This action was prompted by wanton attacks on some small children, usually girls, resulting, in two instances, in the death of the victims. The committee is composed of men and women distinguished in various fields, including medicine and psychiatry. The court of Special Sessions, through the trial of cases charging the impairment of the morals of minors and those charging indecent exposure, has acquired first hand knowledge of the type of individual usually involved as defendants therein. It is hoped that this study may result in the recommendation and adoption of means and measures whereby our youth may be more certainly protected from ruthless, moronic assaults.

At times cases are tried involving the violation of the civil service law. In certain instances a defendant has taken an examination in the name of an applicant other than himself. Where successful this may result in giving an unqualified person a high rating on the civil service list followed by appointment, whereas in fact he may be thoroughly incompetent and unable to pass the most elementary test. This law has also at times been violated by defendants who pretend to have the means of procuring special consideration in the marking of papers or in some other way of unlawfully benefiting an applicant. Of course, moneys paid to such pretenders represent an unlawful exaction from the applicants.

The court of Special Sessions has exclusive jurisdiction of cases involving paternity. Where after a trial the court adjudges a defendant to be the father of a child born out of wedlock, an order of filiation is entered requiring the defendant to support the child until it attains the age of 16 years. During the year 1939 there were 1,533 such cases tried by the court.

In its appellate jurisdiction the court frequently meets with cases of unusual interest. One such case involved a question of interstate commerce as growing out of an ordinance passed by the city of New York requiring truckmen to take out licenses as a condition of operating within the city limits. The carrier, an interstate trucking company, claimed the right to unload an interstate shipment of merchandise from its trucks onto a platform maintained in connection with a storage warehouse in New York City and to make deliveries thereof by the use of small ordinary trucks carrying the goods from the unloading platform to the consignee in the city. It was held by the court of appeals, upon appeal from the appellate part of Special Sessions, that the use of these large trucks did not require a license from the city since the entire shipment from its initiation to its final designation constituted interstate commerce.

APPELLATE FUNCTION IMPORTANT

The appellate part of Special Sessions has also dealt with other interesting questions involving provisions of the administrative code of the city of New York relating to the weighing of coal, the sales tax upon cigarettes sold in the city of New York, the right of labor to picket in cases of so-called secondary boycott, and the right to carry on certain types of business including the sale of printed matter without procuring a license.

Under the law a decision by two of the three justices becomes the judgment of the court. Since the court sits without a jury but in benches of three, the bench is empowered to pass upon all questions of fact as well as law. This eliminates a jury and saves the time normally taken in the questioning and empaneling of jurors who act as triers of the facts. It is certain that the large volume of cases in the city of New York could not be handled under a jury system without vastly increasing the number of judges, court space, personnel and equipment. Under its system of probation with a competent staff of probation officers, the court of Special Sessions is equipped to extend extreme leniency to the youthful and inexperienced who give promise of rehabilitation. Many persons have advocated the use of benches of three, sitting without a jury for the trial of civil cases. Certainly such a plan merits investigation, for if a bench of three can successfully be employed in cases where personal liberty is at stake, it would not seem unreasonable to extend it in the field where the mere award of damages is involved.

Judicial Regulation of Stare Decisis—A Comment

BY FRED T. HANSON*

AN ARTICLE in the February issue of the JOURNAL suggests that courts should withhold the retroactive operation of overruling decisions, not only from existing contracts and vested rights, but from all cases of reasonable and justifiable reliance upon the doctrine overruled. The importance of the part played by the advocate in the improvement of law by the judicial process is admirably described. But the effect of the proposal upon his access to courts of last resort is not considered.

Doubtless a public spirited bar will not cease to contend for desirable changes in the law because the hope of advantage in the case at hand is withdrawn. But causes do not belong to lawyers and cannot be presented by appeal without fully advising litigant what, if anything, he may hope to gain. While the proposed doctrine is in a state of flux the chance of material victory by an overruling decision will survive. But as the new field is pricked out by decisions, and approaches the ideal of certainty, the upward way of the advocate will become strait. The average litigant, whose case is the lawsuit of a lifetime, is unlikely to be lured by the mere possibility of having a new dispensation bear his name. There will still be cases where, fortuitously, other litigable questions justify appeal. Here the public spirit of the bar can continue to function. There will remain also the cases involving a litigant's continuing business or course of conduct in which he may reap future benefits from the change of law. This probably was true in Great Northern Ry. v. Sunburst Oil Co. In such situations the client's material interests will still furnish an avenue for the advocate. But these are special cases.

It is readily agreed that the emendation of law by the traditional judicial process is no usurpation. But courts differ from legislatures in accessibility. The lobbyist needs no justiciable controversy. The advocate before a court of last resort must still have one. The "advisory opinion" as it exists in Massachusetts and elsewhere is a strictly limited and thought provoking exception. One may agree with the realistic view that the common and statute-aiding law does not exist unruffled by the mistaken utterances of its judicial oracles, and yet venture to suggest that retroactivity, although a corollary of the repudiated theory, has a pragmatic function which should be weighed against the occasional victim that it now immolates upon the altar of progress in cases of actual *ante litem motam* reliance.

An enlightened reliance upon the ultimate triumph of sound doctrine may be at least equally reasonable and justifiable. Whether diminution of the hope it inspires would be fortunate for the growth of the law is a serious question.

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READER PLEASED BUT NOT SATISFIED

In the article in the February number of the JOURNAL Frank W. Grinnell showed how slow judges (and lawyers) are to utilize available remedies. The article, entitled "Judicial Regulation of Stare Decisis," brought to Mr. Grinnell some interesting comments. A prominent Boston lawyer (name on request) opened his letter with, ". . . your article pleases me but does not satisfy me." Continuing, this correspondent said:

"Why not state also that by reason of the failure of courts to use their powers to the fullest extent, the profession of the law has suffered, will continue to suffer, and may become non-existent. Almost every new board or tribunal that has been set up locally or nationally derives its existence from the failure of courts to exercise jurisdiction in the sphere of activity of such board or tribunal.

"When the public realizes that boards of laymen can and do deal with problems of a judicial character, no one can object if the swing to such procedure eliminates both judges and lawyers. If you think the word eliminate is too strong, question fifty lawyers and ask them what their incomes have been for the past three years."

Federal Judicial Reform Program Marches On

THE ARTICLE concerning progress achieved in reform of the Unted States court system, which appeared in the recent December number of the JOURNAL, predicted an early start on the work of drafting rules of criminal procedure, from indictment to sentence. That work is now underway with a fully organized committee appointed, according to the enabling act, by the supreme court. A first session was held February 21, in the supreme court building. The appointments made by the justices were as follows: chairman, Arthur T. Vanderbilt; reporter, James J. Robinson, of the University of Indiana law school and chairman of the criminal law secton of the ABA; secretary, Alexander Holtzoff, special assistant attorney general.

The other members of the committee are as follows: Professor Newman F. Baker, Northwestern University Law School, George J. Burke, Ann Arbor, John J. Burns, Boston; Judge Frederic E. Crane, New York; Gordon Dean, Washington; professor George H. Dession, Yale Law School; Professor Sheldon Glueck, Harvard Law School; George Z. Medalie, New York; Professor Lester B. Orfield, University of Nebraska Law School; Murray Seasongood, Cincinnati; J. O. Seth, Santa Fe; Professor John B. Waite, University of Michigan Law School; Professor Herbert Wechsler, Columbia Law School and G. Aaron Youngquist, Minneapolis.

Among the numerous encouraging factors is the competence of the profession in respect to such work. The American Law Institute studies developed methods and men and particularly in this especial field of criminal rules. The work of the supreme court committee that drafted the civil rules afforded much valuable experience. It has been said that it may require three years to complete the present assignment. Any precise period cannot be assured, but it would seem reasonable to expect this work to be completed in less time than was taken for the civil rules drafting. There are in actual operation, or in model drafts thoroughly developed, the practical answers to most problems. That the problems are difficult is often due to the fact that there appear to be more than one, or two, better modes, in which case a choice may be considered tentative, for it must be assumed that from this time the text of criminal procedure rules will be in the hands of the supreme court, and experience is said to be one of the best of teachers.

The work will be much assisted through the aid of Leland L. Tolman of the administrative office in the supreme court building, and his assistants. It should be needless to say that while the most thorough work possible is to be assumed, the matter of time is by no means unimportant.

A member of the committee informs the JOURNAL that the first meeting resulted in agreement concerning the scope of the rules, methods of drafting and the larger factors of policy. The members appear to be intensely interested and confident. The Editor is informed that:

"Plans were perfected to seek assistance from all state and local bar association committees on criminal justice. Also contact will be made with local district attorneys and judges. Opportunity will be afforded individuals and organizations to submit proposals. The machinery is provided for giving careful attention to all ideas and plans that are submitted. . . The committee will give some attention to matters of evidence so far as procedural matter is affected thereby. In this field discovery, depositions and expert testimony will be studied."

SUMNERS BILL IS IMPORTANT

It is very sincerely hoped that Chairman Sumners of the house judiciary committee will succeed soon in securing enactment of his bill to permit investigation of a judge's conduct without employing the ponderous powers of impeachment. His plan for permitting the house of representatives, by resolution, to bring about an investigation of charges against a judge by a special court of three circuit judges stands now virtually without bar opposition. Much can be said for its merits. An innocent judge, irresponsibly accused of improper conduct, can not now by any means meet his accusers and defend his reputation. Impeachment, from the prac-

tical standpoint, has never been of much value in the judicial sphere. Judges not convicted have nevertheless been ruined.

ABA COMMITTEE PROPOSALS

Concerning tenure there is also the proposal of the ABA committee on jurisprudence and law reform that judges who become permanently disabled before qualifying for retirement because of age, should be enabled to retire on pension, instead of trying, against fate, to preserve their status as active judges. The committee's report (64 ABA Rep. p. 209) contains some excellent proposals for salutary legislation.

The opposition to the use of public defenders has a slender base, and the congress should be induced to make a fairly generous allowance for that purpose.

Perhaps some of the committee's proposals may be effectuated by the new rules committee; the "notice of defense by alibi" and "the comment upon failure of defendant to testify," for instance. Either by statute or by rule there should be provision for "appeals by U. S. from order sustaining demurrer and like pleadings in criminal cases."

We have recently observed the absurdity and waste of time and money when suits are prosecuted in two or more circuits to ascertain rights under new statutes. Reform in this matter, under organized administration, should be possible without a statute. The policy henceforth should be that of utilizing as fully as possible the rule-making and the administrative powers, and of being economical of legislative powers. This wholesome policy is suggested at present by bills in congress to make a district judge ineligible to assist a circuit court, and a circuit judge ineligible to hear and try cases in the district court. Such proposals are representative of hundreds of hampering laws in state and federal statute books. They do much to paralyze judicial responsibility, and nothing to improve service.

From the same report it appears that relief is needed for prisoners who cannot find bail and want to plead guilty and receive a sentence. They cannot be gratified for six months or more in some districts because there is no term of court and hence no grand jury. This is verily a pitiful situation. The words of the constitution: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except" men in the army and navy.

GRAND JURY DOCTRINE ATTACKED

The committee say: "While indictment by a grand jury is a basic constitutional right, there is no reason why a defendant should not be permitted to waive a trial if he so desires, just as he is permitted to waive a trial by jury and to consent to be tried by the court."

Since the right to a grand jury presentation is guaranteed as a *privilege* the position of the committee seems impregnable. A privilege can be waived.

Consideration of this should lead the new committee into a thorough study of modes of presentment. We are two hundred years behind the times in a number of our states. In about half the states the prosecutor has the choice of indictment, or of presentation by a *magistrate* after a hearing (in which the respondent may prove his innocence immediately). The grand jury remains, largely, as a political device to enable officials to form contacts with the citizenry, or, at the worst, to enable favored miscreants to escape justice. In only one state has the ancient farce been fully exposed. In Michigan for twenty years every judge has possessed all the powers of a grand jury, and it is probable that there has been no real grand jury in that state for two decades.

It is an inspiring thought that bench and bar, aided by a few informed congressmen, are moving toward a judicial system as nearly perfect as a rigid constitution and erring human nature permit. The studies to be made by Chairman Vanderbilt's committee should prove invaluable. This brief survey will be interrupted here after suggesting that the American Bar Association may succeed in adding to its ability to educate congressmen. A consummation devoutly to be wished!

Small causes may well present quite as difficult problems as those involving large sums of money or valuable property. What is unprofitable for the lawyer is not necessarily unprofitable for the law.—*Roscoe Pound.*

States Move to Modernize Civil Procedure

LAW IS CONSERVATIVE. It applies the experience of the past to the problems of the present and future. No part of it is more conservative, more resistant to change, than procedure. Yet it is as important that the machinery of justice be up to date as it is that the machinery of industry make use of the latest inventions. Progressive lawyers all through the centuries have realized this, and there never has been a time since the days of Chitty or before when someone was not agitating for modernization of legal procedure. In fact, because the procedure of the past has held its citadel so securely it has been assaulted more continuously and vigorously than most other anachronisms of the law.

These assaults have not been without success. A century ago the development and widespread adoption of David Dudley Field's code of civil procedure took on the aspect of a national movement for procedural reform. With it, some twenty-eight states and territories combined law and equity, replaced common-law pleading with the single form of action, and adopted other equally important improvements and modernizations. Field must be ranked among the greatest legal reformers of our country, and the chief procedural problems that remained after him were the complexities of litigation in some of the states that had resisted his reform, and the disparity everywhere between state and federal procedure that compelled lawyers to keep two separate systems constantly in mind.

The conformity act of 1872 was a nineteenth-century effort to deal with the latter problem, but it was conformity in reverse, for it proposed that the one conform to the many instead of the many to the one. Its actual result was confusion worse confounded, and early in the present century the American Bar Association, largely through the efforts of Thomas W. Shelton interested itself in the opposite approach—a uniform procedure for the federal courts to become, with good fortune, uniform in the states also. The story of the twenty-five-year fight for the new federal rules of civil procedure is told in a recent article in this JOURNAL.[1]

The decade that witnessed the adoption of those rules will go down in history as the beginning of another great national procedural reform movement. The federal achievement alone was a forward step of supreme importance, but the most significant development has been the enthusiasm all over the country to follow up with a revision of state precodure. Most of these projects are intended to result in a state code patterned as closely after the federal code as possible, thus achieving the double gain of modernization and conformity.

To chart this crusade and measure its progress in each state is the purpose of this article. Information has been gathered from current publications and from correspondents in the various localities. It is not complete, for information from some states was not obtainable, but it is believed that no important activity has been missed. All stages of progress are to be found among the states, from the few that have modernized codes now in use to the few in which nothing at all has been done. The classifications on the map are not exact and cannot be without the use of more cross-hatching patterns than the science of geometry affords. Further information from any state will be welcomed by the editors.

Five states—*Michigan, Illinois, Connecticut, Arkansas* and *Utah*—must be credited with modernized procedure adopted prior to the advent of the federal rules in 1937.

The Michigan legislature in 1927 requested the supreme court to exercise the rule-making power it had been neglecting since 1850, and appointed a commission to assist it. The commission took its job seriously, and with the help of suggestions and criticisms from hundreds of lawyers throughout the state Professor Edson R. Sunderland of the University of Michigan law school, draftsman for the commission, drafted a complete code revision which went into effect on January 1, 1931.[2] Common-

1. "Federal Judicial System Nears End of Reform Program," 24 Jour. Am. Jud. Soc. 106, Dec., 1940.

2. "Michigan Leads in Procedural Reform," 15 Jour. Am. Jud. Soc. 6.

law pleading survived in Illinois until January 1, 1934, when the new civil practice act, in the drafting of which Professor Sunderland also assisted, made that state the most advanced instead of the most backward in civil procedure.[3] This act had its influence in the drafting of the federal rules, which began the same year.

Connecticut lawyers are satisfied with their civil procedure, which has been highly praised, and so are those of Utah, where a general revision was made in 1933. In neither state is there any demand for rules revision now. The Arkansas code has not been revised for seventy-three years, but the revision of 1868 by Judge Henry C. Caldwell, an appointee of President Lincoln, was a marvel for its time and is still so good that Arkansas lawyers think it excels the federal rules in many respects.

Three states—*Arizona, South Dakota* and *Colorado*—have new codes of civil procedure adopted since 1937 and conforming substantially with the federal rules.

The Arizona code set a precedent when it adapted the federal rules to state use with an absolute minimum of textual alterations. Even the section numbers are identical. The new code took effect on January 1, 1940.[4] South Dakota was a year ahead of Arizona, but instead of deliberately carrying over verbatim as much of the federal rules as possible the South Dakota committee worked out its own careful revision of state procedure, borrowing freely from the federal code.[5]

On April 6, 1941, the new Colorado code takes effect, having been formally adopted by the court on January 6.[6] It conforms substantially with the federal rules but differs in some details and contains a few additional paragraphs. The federal section numbering has been retained as far as possible. The Colorado Bar Association has been sponsoring a series of institutes to acquaint the lawyers with the new rules.

In five states—*North Dakota, Rhode Island, Missouri, Florida* and *Texas*—revised codes are wholly or substantially completed and awaiting adoption.

North Dakota's 1939 legislature passed an act providing for complete revision of the public laws, including civil and criminal procedure.[7] A committee headed by Judge Gudmundur Grimson was assigned to civil procedure, and the subcommittee in charge of trial and appellate procedure adopted the federal rules as a model for its work. It has now finished a draft adapting those rules to North Dakota practice, and during the coming months its draft will be submitted to the lawyers of the state by mail and at bar meetings for criticism and suggestions. The final draft will go to the 1943 legislature for adoption along with the rest of the revision program. A statute recognizing the exclusive rule-making power of the supreme court was passed last month.

The Rhode Island Bar Association last summer approved by vote of its membership a draft of a new code after the federal pattern. The superior court was given rule-making power by the last legislature, and is now hearing arguments for and against the adoption of the code.

In 1939 the Missouri legislature passed a resolution inviting the supreme court to submit suggestions for a revised code of civil procedure. The court thereupon appointed a committee of fifty-three lawyers and judges, which prepared and submitted two alternative plans, one containing thirteen specific amendments and the other a complete revision based on the federal rules.[8] The court is now preparing its recommendations to the legislature, but the legislature is so far behind with its work because of a contested governorship that it does not seem likely that it will get around to considering civil procedure this session. The subject may be included in the call for a special session later in the year.

The Florida Bar Association's struggle for

3. "Illinois Procedure Goes Modern," 17 Jour. Am. Jud. Soc. 40.

4. "Conformity Achieved Through Arizona's New Rules," 23 Jour. Am. Jud. Soc. 215; "Arizona Uses Federal Court Practice as Model," 26 A. B. A. Journal 413. See also Jour. Am. Jud. Soc., 23:123 and 23:174.

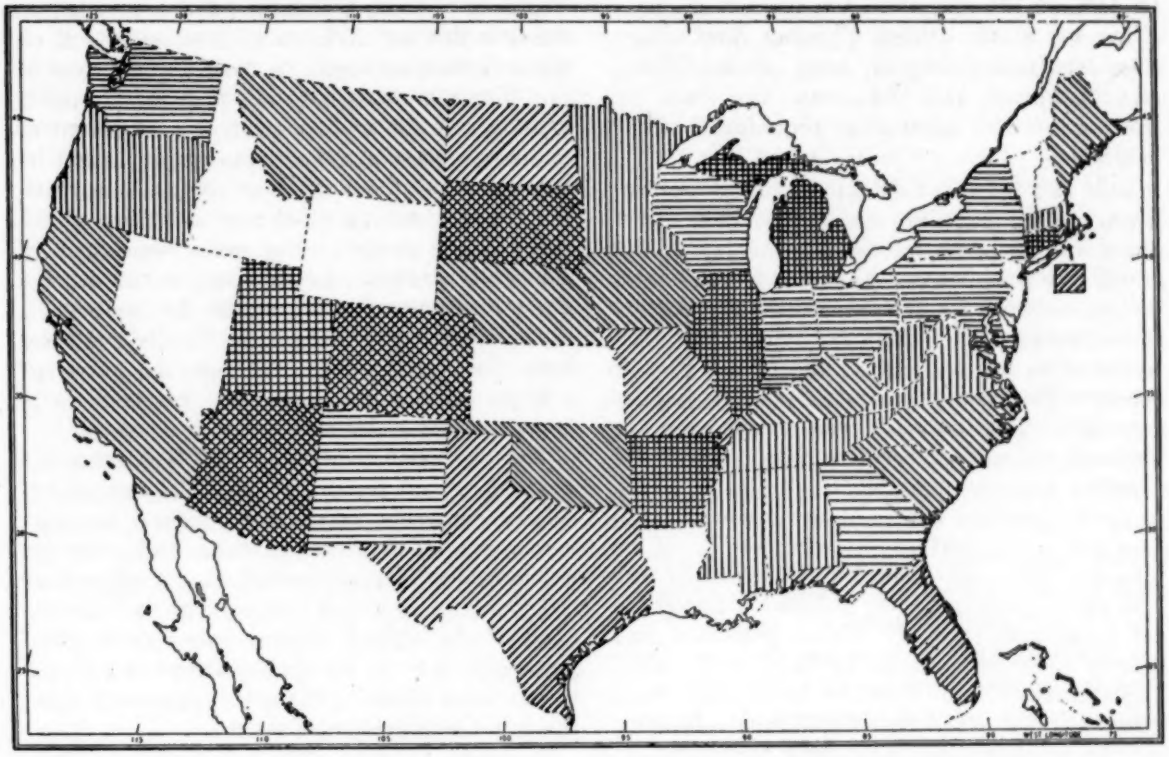
5. "South Dakota's Modern Procedure Code," 23 Jour. Am. Jud. Soc. 20. See also the April, 1939, South Dakota Bar Journal, Vol. 7, No. 4.

6. "Colorado Bar Produces New Civil Code," 24 Jour. Am. Jud. Soc. 143; "Adoption of New Rules of Civil Procedure in Colorado," 46 Commercial Law Journal 68, March, 1941; see also A. B. A. Journal 26:546 and 27:126, and 23 Jour. Am. Jud. Soc. 19.

7. See 24 Jour. Am. Jud. Soc. 23.

8. 23 Jour. Am. Jud. Soc. 65. See Missouri Bar Journal, 11:108, 193 and 12:3.

PROGRESS OF CIVIL PROCEDURE REFORM



Modernized procedure prior to 1937.

Modernized procedure adopted since 1937.

Revised code drafted and awaiting adoption.

Bar association is sponsoring procedural reform project.

Project being pushed by active minorities.

No revision contemplated, but code frequently amended.

Blank states: No activity reported.

procedural reform has attracted the attention of the nation.[9] Last summer they drafted a set of rules patterned like Arizona's just as closely after the federal as possible. These they petitioned the supreme court to adopt on the theory of inherent rule-making power, no enabling act having been passed by the legislature. The court declined to assume such power, but acknowledged emphatically the need for revision. The Association has now requested the legislature to pass an act delegating rule-making authority to the court and will then take the code up to the court again. Such a course seems likely to meet with success.

On September 1, 1941, unless previously disapproved by the state legislature, a new code of civil procedure will take effect in Texas. It contains many desirable features of the federal code, but represents the independent work of a local committee, and has incorporated scores of suggestions from a state-wide referendum of lawyers. Some last-minute opposition to its

9. "Rule-Making Power Denied in Florida," 24 Jour. Am. Jud. Soc. 149; "Should Florida Adopt the Federal Rules of Civil Procedure by Rule of Court?" by Gilbert W. Newkirk, 14 Fla. Law Journal 305; "Should the Rules of Federal Civil Procedure Be Adopted by the Supreme Court of Florida?" by Herbert S. Phillips, 15 Fla. Law Journal 339 and 26 A. B. A. Journal 873. The rule-making bill is in 15 Fla. Law Journal 37, Feb., 1941.

adoption has appeared, but it is not likely to be defeated.[10]

In nine states—*North Carolina, South Carolina, Montana, Kentucky, Iowa, Maine, Nebraska, California* and *Oklahoma*—the state bar associations are sponsoring procedural reform projects.

Bills providing for delegation of rule-making power to the supreme court have been introduced in the 1941 legislatures of North and South Carolina, Montana and Iowa, and are on the legislative programs of the bar associations of Kentucky and Oklahoma. The 1940 California state bar convention approved a plan to delegate the power by statute to the judicial council.[11] The Iowa bill was passed, and the Montana bill was expected to pass. The North Carolina bill was defeated in the lower house. In South Carolina it passed one house last session and bar leaders are hopeful that it will go through this time. The Maine legislature has just authorized the chief justice to appoint a bar committee to study Maine procedure and submit recommendations by October 1, 1942. The statute will not formally become law until three months after the legislature adjourns, but the bar is already preparing for the work. In Nebraska such a committee appointed by the court has been conducting its study for nearly two years. Eleven of its thirteen subcommittees have reported, and it expects to have a report in the hands of the supreme court by September.

In eight states—*Mississippi, Minnesota, Oregon, Tennessee, Virginia, West Virginia, Alabama* and *Massachusetts*—minority efforts to build up interest in rules revision are being made.

Revision of state procedure to conform to the federal rules is being urged in Mississippi by the Junior Bar and in Minnesota by the judicial council. The judicial administration committee of the Oregon state bar recommended a rule-making bill, but the members voted against it 598 to 249. Another effort will be made after an educational campaign.

The *Tennessee Law Review* published an article by Walter P. Armstrong on adaptation of federal reform to Tennessee practice,[12] and the subject is frequently discussed at institutes and bar meetings, but no action has been taken. The *Law Review* will soon publish articles on the Colorado and Arizona achievements to stimulate further interest. A special committee of the Virginia state bar will urge at the 1941 state convention endorsement of a program for complete rules revision to be accomplished by passage of a rule-making act in 1942, work on the revision during 1943, and adoption of the revised code in 1944. The executive council of the West Virginia Bar Association has drafted a set of proposed amendments for that state. In Alabama, as in Tennessee, the federal rules have been much discussed but the stage of definite action has not been reached. Alabama's equity rules were recently revised.

The sixteenth report of the Massachusetts judicial council prints two pages of column-by-column contrasts between the federal and corresponding Massachusetts rules and urgently recommends turning control of procedure over to the courts as a first step toward its improvement.[13] In 1939 a strong rule-making campaign joined in by lay organizations met defeat in the lower house of the state legislature after the bill had passed the senate.

In nine states—*Wisconsin, Washington, Pennsylvania, New Mexico, Indiana, Maryland, New York, Ohio* and *Georgia*—there is a program of one kind or another for improvement of civil procedure, but it involves amending the present code and not substitution of a revised code.

Something is being done in each of these nine states, but what they are doing presents a wide variety. Wisconsin has been a code state from the start, and its advisory committee on the rules of pleading, practice and procedure has been on the job continuously with the result that Wisconsin procedure is in very good shape and perhaps deserves to be grouped with those states at the beginning of this article. The Washington judicial council has been performing the same service for Washington procedure, and the procedural rules committee in Pennsylvania has recommended and secured nine important changes in that state's code during its four years of existence.[14] The New Mexico supreme court has been exercising its

10. The story is told from month to month in the 1940 volume of the Texas Bar Journal, and the rules are printed in full in the December, 1940, number.

11. Report of committee on rules of civil procedure, proceedings, thirteenth annual meeting, State Bar of California, pp. 430-443, and debate, pp. 211-216.

12. 16 Tenn. Law Review 379.

13. 26 Mass. Law Quarterly 36.

14. "Work of Pennsylvania Rules Committee," by Albert Smith Faught, 24 Jour. Am. Jud. Soc. 26.

rule-making power since it was conferred in 1933, and New Mexico procedure is very similar to the new federal code. The supreme court is considering adoption of a new code after the federal pattern and has a committee studying the matter.

The Indiana judicial council recommended a new code like the federal one, but the supreme court suggested instead that the council submit proposed amendments to the present code to take advantage of the best of the new ideas in the federal rules. This was done and the partial revision prepared by the judicial council was adopted to take effect on September 2, 1940.[15]

The Maryland court appointed a committee to undertake a code revision project,[16] which began its work with a letter to about 800 Maryland lawyers, most of whom urged conservatism and opposed the merger of law and equity. A partial revision of Maryland procedure was submitted and approved by the court and will take effect on September 1 if not previously disapproved by the legislature. A bill to express such disapproval was being hotly debated at the time of our latest information, and the ultimate status of the amendments remains in doubt.

The New York judicial council does what it can for New York procedure every year, but the original Field code in that state has suffered from much shuffling and deserves a thorough overhauling. The Ohio judicial council has been recommending improvements in procedure year after year, but they do not get the attention from the legislature they should have. The Georgia Bar Association has an active committee on procedural reform which has sponsored three bills in the current legislature and supported others.

The foregoing paragraphs account for thirty-nine of the forty-eight states. The others are not necessarily inactive or behind the times. Nevada's present code was adopted in 1911. The Delaware and New Jersey courts have rule-making power. There is now a campaign for a new constitution in New Jersey, and it might bring about improvement of civil procedure as well as other reforms if it is obtained.

15. Fifth Annual Report, Judicial Council of Indiana, p. 9.

16. "Maryland Act Like Federal Model," 23 Jour. Am. Jud. Soc. 18.

Judge Parker's Committee Is Active

Under the energetic leadership of Judge John J. Parker, the American Bar Association's Special Committee on the Improvement of the Administration of Justice has been proceeding rapidly with its work.

To rally the legal profession behind the program, Judge Parker and other members of the committee have been addressing regional bar meetings from Boston to Los Angeles, urging improvement in judicial organization, judicial rule-making power, improvement of jury trial, adoption of state civil procedure to conform with the new federal rules, and other reforms listed in the program agreed upon at the November meeting of the committee in Washington and reported in the December JOURNAL (24:129).

The first of a series of monographs dealing with various aspects of the program appeared in February. It is entitled, "Judicial Councils," and was prepared by Professor Maynard E. Pirsig of the University of Minnesota, secretary of the Minnesota judicial council. Others in preparation are "The Rule-Making Power," by Professor Silas A. Harris of Ohio State University; "Summary Judgments," by Judge Charles E. Clark; "Pretrial Procedure," by Judge Bolitha J. Laws; and "Instructions to Juries," by Judge W. Calvin Chesnut. The committee intends to circulate the monographs widely among bar committees, civic associations, legislators and newspapers.

Louisiana Integration Completed

The new integrated bar of Louisiana began its formal existence on March 12, 1941, when the supreme court entered an order approving the articles of incorporation submitted by the advisory committee in February. Pike Hall, Shreveport, president of the old state bar association, was named to head a temporary staff of officers, and a convention of the new organization was called for April 18 and 19 at Lake Charles, where the charter will be approved by the members and permanent officers elected.

Missouri's Ideal Judicial Selection Law*

By THOMAS F. McDONALD†

"We strongly favor a system whereby judges are to be appointed by an official and responsible authority, whose power of appointment, however, is to be guided by a body of intelligent opinion and subjected to final control by popular will effectively voiced through the ballot."—*From the preliminary report of the special committee of the Bar Association of St. Louis.*

NO CERTAIN date can be fixed for the beginning of the movement for reform of selection of judges in Missouri, but the first step of practical significance in the series of events that led to the adoption of a constitutional amendment last fall was the appointment in 1936 of a special committee on judicial selection and tenure of the Bar Association of St. Louis. This committee of seven, with Ronald J. Foulis as chairman, was continued without change in personnel by the next president of the Association, and on September 20, 1937, it submitted a preliminary report which laid the foundation for all the action that was to follow.

The committee first examined the existing elective system and found it defective in three important particulars: it did not encourage those best qualified for judicial service to become candidates for the bench; it was not conducive to the highest type of performance of judicial duty after election; and it was elective and democratic only in theory, being actually a system of selection by persons with political power.

Next, the committee examined the two most prevalent substitutes for judicial elections then in vogue—separate judicial elections and non-partisan judicial ballots. Lack of political significance of judicial elections and the consequent indifference of the electorate were found to render both plans unsatisfactory. One separate judicial election in Chicago had drawn only 8.1 per cent of the votes, and the committee quoted the words of Newton D. Baker and Senator Burton of Ohio that their drafting of that state's non-partisan election plan had been a "disservice."

The committee then stated the objective of its efforts in one well-worded sentence which deserves to be quoted: "We strongly favor a system whereby judges are to be appointed by an official and responsible authority, whose power of appointment, however, is to be guided by a body of intelligent opinion and subjected to final control by popular will effectively voiced through the ballot." Suggestions were invited from members of the bar, and with their assistance Professor Israel Treiman of Washington University, vice-chairman of the committee, took charge of the drafting of a proposed constitutional amendment which was approved by the bar association.

The next step was one of promotion and publicity. Many excellent committee reports have been printed, bound, filed and forgot; this report was destined for an active life. Being involved in a state-wide project, the Bar Association of St. Louis sought and secured the cooperation of the Kansas City and the state associations. Of great significance in the final outcome was the successful enlistment of lay agencies representing all interests and from all sections of the state. The Missouri Institute for the Administration of Justice was selected, because it represented all parts of the state and all interested groups, to take active charge of the work. J. Lionberger Davis, outstanding civic leader, was its president, and Kenneth Teasdale, St. Louis bar leader, its counsel.

This organization promptly assumed leadership of a vigorous state-wide campaign. Funds were solicited, speakers' bureaus organized, and a four-page paper, the "M.I.A.J. News," was broadcast throughout the state. The metropolitan press lent whole-hearted support to

*See December, 1940, issue, page 118, of the JOURNAL OF THE AMERICAN JUDICATURE SOCIETY for a full statement on the amendment.

†Of the law firm of Donnell and McDonald, St. Louis, Mo.; Chairman of the Board of Directors, Am. Jud. Soc.

the very end, and the effectiveness of all these factors on public opinion was tested by a statewide poll which found both lawyers and laymen favoring the plan by more than ninety per cent.

The first move toward getting the plan into law was a joint resolution sponsored by the St. Louis and Missouri bar associations in the 1939 legislature to sumit the plan to the people as a constitutional amendment in the 1940 election. This effort failed because of the refusal of a consistently hostile legislature to cooperate. Undeterred, the Institute organized an initiative campaign. Speakers and publicity went out again and Missourians from Hannibal to Joplin received—and welcomed—an education in one important phase of judicial administration. By July 2, 1940, twice the number of signatures needed had been secured, and the petitions were filed with the secretary of state. The educational campaign continued through the summer and fall months and in November the voters vindicated the objectives, tactics and energy of the Institute and its workers by giving the amendment a smashing 100,000 majority on a ballot on which the remaining six proposals were all badly defeated.

Because of its importance as a pattern for improvement of the judiciary in other states, the text of the amendment as adopted is here reprinted in full:

TEXT OF CONSTITUTIONAL AMENDMENT

BE IT ENACTED by the people of the State of Missouri as follows:

The Constitution of the State of Missouri is hereby amended by adding to Article VI thereof seven new sections to read as follows:

Section 1. Whenever a vacancy shall occur in the office of judge of any of the following courts of this State, to-wit: the Supreme Court, the Courts of Appeals, and the Circuit and Probate Courts within the City of St. Louis and Jackson County, the Governor shall fill such vacancy by appointing one of three persons, possessing the qualifications for such office, who shall be nominated and whose names shall be submitted to the Governor by a nonpartisan judicial commission established and organized as hereinafter provided.

Section 2. At any general election, the qualified voters of any judicial circuit, outside of the City of St. Louis and Jackson County, may by a majority of those voting on such question elect to have the judges of the courts of record therein, other than judges of the county courts, appointed by the Governor in the manner provided herein for the appointment of judges to the courts designated in Section 1 of this amendment. The General Assembly may provide the manner in which such question shall be submitted to such voters.

Section 3. Each judge appointed pursuant to the provisions of this amendment shall hold office for a term ending December 31st following the next general election after the expiration of twelve months in such office. Any judge holding office, or elected thereto, at the time of the election by which the provisions of this amendment become applicable to his office, shall, unless removed for cause, remain in office for the term to which he would have been entitled had the provisions of this amendment not become applicable to his office. Not less than sixty (60) days prior to the holding of the general election next preceding the expiration of his term of office, any judge whose office is subject to the provisions of this amendment may file in the office of the Secretary of State a declaration of candidacy for election to succeed himself. If a declaration is not so filed by any judge, the vacancy resulting from the expiration of his term of office shall be filled by appointment as herein provided. If such a declaration is filed, his name shall be submitted at said next general election to the voters eligible to vote within the geographic jurisdictional limits of his court, or circuit if his office is that of Circuit Judge, on a separate judicial ballot, without party designation, reading: "Shall Judge [Here the name of the judge shall be inserted] of the [Here the title of the court shall be inserted] Court be retained in office? Yes. No." [Scratch One.] If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office a vacancy shall exist which shall be filled by appointment as provided in Section 1 of this amendment; otherwise, said judge shall, unless removed for cause, remain in office for the number of years after December 31st following such election as is provided for the full term of such office, and at the expiration of each such term shall be eligible for retention in office by election in the manner here prescribed.

Whenever a declaration of candidacy for

election to succeed himself is filed by any judge under the provisions of this section, the Secretary of State shall not less than thirty (30) days before the election certify the name of said judge and the official title of his office to the clerks of the county courts, and to the boards of election commissioners in counties or cities having such boards, or to such other officials as may hereafter be provided by law, of all counties and cities wherein the question of retention of such judge in office is to be submitted to the voters, and, until legislation shall be expressly provided otherwise therefor, the judicial ballots required by this section shall be prepared, printed, published and distributed, and the election upon the question of retention of such judge in office shall be conducted and the votes counted, canvassed, returned, certified and proclaimed by such public officials in such manner as is now provided by the statutory law governing voting upon measures proposed by the initiative.

Section 4. Non-partisan judicial commissions whose duty it shall be to nominate and submit to the Governor names of persons for appointment as provided by this amendment are hereby established and shall be organized on the following basis: For vacancies in the office of judge of the Supreme Court or of any Court of Appeals, there shall be one such commission, to be known as "The Appellate Judicial Commission"; for vacancies in the office of judge of any other court of record subject to the provisions of this amendment, there shall be one such commission, to be known as "The .....Circuit Judicial Commission," for each judicial circuit which shall be subject to the provisions of this amendment; the Appellate Judicial Commission shall consist of seven members, one of whom shall be the Chief Justice of the Supreme Court, who shall act as Chairman, and the remaining six members shall be chosen in the following manner: the members of the Bar of this state residing in each Court of Appeals District shall elect one of their number to serve as a member of said commission, and the Governor shall appoint one citizen, not a member of the Bar, from among the residents of each Court of Appeals District, to serve as a member of said commission; each Circuit Judicial Commission shall consist of five members, one of whom shall be the Presiding Judge of the Court of Appeals of the District within which the judicial circuit of such commission or the major portion of the population of said circuit is situated, who shall act as Chairman, and the remaining four members shall be chosen in the following manner: the members of the Bar of this state residing in the judicial circuit of such commission shall elect two of their number to serve as members of said commission, and the Governor shall appoint two citizens, not members of the Bar, from among the residents of said judicial circuit, to serve as members of said commission; the terms of office of the members of such commissions shall be fixed by the Supreme Court of Missouri and may be changed from time to time, but not so as to shorten or lengthen the term of any member then in office. No member of any such commission other than the Chairman shall hold any public office, and no member shall hold any official position in a political party. Every such commission may act only by the concurrence of a majority of its members. The members of such commissions shall receive no salary or other compensation for their services as such, but they shall receive their necessary traveling and other expenses incurred while actually engaged in the discharge of their official duties. All such commissions shall be administered, and all elections provided for under this section shall be held and regulated, under such rules as the Supreme Court of Missouri shall promulgate.

Section 5. All expenses incurred in administering this amendment, when approved by the Supreme Court of Missouri, shall be paid out of the state treasury. The Supreme Court shall certify such expenses to the State Auditor, who shall draw his warrants therefor payable out of funds not otherwise appropriated.

Section 6. No judge of any court of record in the State of Missouri, appointed to or retained in office in the manner prescribed herein, shall directly or indirectly make any contribution to or hold any office in a political party or organization, or take part in any political campaign.

Section 7. All the provisions of this amendment shall be self-enforcing except those as to which action by the General Assembly may be required.

The effective date of the amendment was December 6, and even before that day the set-

ting up of the organization called for was under way, stimulated by an article by Professor Treiman in the *St. Louis Daily Record* calling attention to the fact that after December 6 there would be no other procedure available for filling a vacancy should one occur.

It is hard to distinguish in importance among the integral and interdependent parts of such a plan, but it was recognized from the start that well-organized and well-administered nominating commissions were vital to its successful operation. These are of two kinds. One commission is known as "the appellate judicial commission" whose duty it is to submit to the Governor names of persons for appointment to fill vacancies on the supreme court and on the three courts of appeals. There is also a "circuit judicial commission" for each judicial circuit to which the amendment is applicable.

The appellate judicial commission consists of seven members, one of whom is the chief justice of the supreme court, who shall act as chairman; the remaining six members are equally divided between lawyers and laymen. One lawyer is chosen from each of the three appellate court districts in Missouri by the members of the bar in the district, and one layman is selected by the Governor from each of the districts.

A circuit judicial commission consists of five members, one of whom shall be the presiding judge of the court of appeals in the district within which the judicial circuit is situated and the remaining four members are selected, two by the members of the bar residing in the judicial circuit from among their members, and two laymen designated by the Governor from non-members of the bar.

COMMISSIONS NOW FULLY ORGANIZED

The appointment of the non-lawyer members of the commissions was made by the Governor in December. The election of the lawyer members of the commissions was had on March 15, 1941, and the commissions are now fully organized.

The amendment provides that all commissions mentioned in the amendment shall be administered, and all elections of members to the various commissions shall be held and regulated, under such rules as the supreme court of Missouri shall promulgate. On January 7, 1941, the supreme court announced its rules governing election of the members of the bar to said commissions.

The rules so announced provide that nominations for the commissions may be made by petition or petitions signed by not less than twenty members of the bar in good standing, residing in the appropriate district or circuit, and filed with the appropriate clerk of the court not later than thirty days prior to the election. The clerk of the court is required to prepare and print ballots containing the names and residence addresses of all qualified nominees. The ballots are mailed by the clerk not less than twenty days before the election, to each member of the bar in good standing residing in the appropriate district or circuit. The ballots are counted under the supervision of the clerk of the appropriate court. If the number of candidates whose names are printed or written on the ballot is three or more the voter shall vote for not less than three candidates in the order of his preference and shall indicate such preference by placing a figure before each name beginning with the figure "1" for his first choice, "2" for his second choice and "3" for his third choice. No ballot shall be counted unless the voter indicates the order of his preference between at least three of the candidates, if there be that many.

The system of voting provided by the rules is a hybrid preferential vote system,[4] sometimes designated the "Mary Ann" system and the "Bucklin System." It is provided that the candidate receiving the majority of first choice votes shall be declared elected, but if no candidate receives a majority of first choice votes, the second choice votes of each candidate shall be added to his first choice votes and the candidate receiving the highest total shall be declared elected, provided his total equals more than one half the number of persons casting legal ballots; but, if such total is less than one-half the number of such persons, then the third choice votes of each candidate shall be added to his first and second choice votes and the candidate receiving the highest total shall be declared elected.

Credit for the adoption of the plan goes to many men and women and organizations who worked diligently to explain its purpose to the people of Missouri, but the Bar Association of

St. Louis can take special pride in the fact that it led the way by the creation of its special committee on judicial selection and tenure which committee outlined the plan finally adopted and continued throughout the entire period to guide the work to a successful conclusion.

REPEAL RESOLUTION PASSES MISSOURI HOUSE

An object lesson in the necessity of continuous vigilance and effort to preserve the benefit of reforms no matter how securely they seem to be won is furnished by the news as we go to press that a resolution has just passed the lower house of the Missouri legislature to submit to the people at the next election a constitutional amendment repealing the one described in the foregoing article.

The vote in the House was 99 to 21. It is hoped that the resolution will not pass the Senate. That repeal could ever survive a popular election appears very unlikely, but the Missouri Institute for the Administration of Justice may be depended upon to take no chances.

Standard Instructions Idea Spreads

"It was apparent that our undertaking would be forced to weave its way through a thicket of human nature, beginning with the negative condition of lack of imagination and extending through complacency, inertia, conflict of interests, and possibly into the thornier coppice of obstinacy, egotism and jealousy."

Those words, spoken by Judge William J. Palmer in this JOURNAL (23:5:177) regarding California's standardized jury instructions, depict without too much exaggeration the path that all legal reform must tread. That it is not too difficult a path for a good idea, however, is proved by the security with which standardized jury instructions are now entrenched in the courts of that state. Further evidence appears in recent dispatches from Chicago and Washington indicating that the idea will soon have a trial in those two cities.

A subcommittee of the rules of court committee of the Chicago Bar Association, in cooperation with certain judges of the circuit, superior and municipal courts, has completed a first draft of instructions covering functions of court and jury, weight of evidence, false testimony, presumptions, negligence, proximate cause, damages, common carriers, and a number of related topics. The December *Chicago Bar Record* carries an account of the project and a review of the reasons for undertaking it, written by Donald B. Hatmaker, chairman of the subcommittee.

Attorneys in the District of Columbia will have the benefit of standardized instructions early in the summer, it was estimated by President Francis W. Hill of the District of Columbia Bar Association in announcing the beginning of work on the project early in December. There, too, a joint committee of lawyers and judges is at work preparing a set of instructions patterned after those in use in California.

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The Judicature Society Invites Cooperation

The American Judicature Society is an agency for cooperation between all persons who are concerned with the problems of administering justice; for all who realize the need of more effective methods and results in keeping with the standards of modern life. To such persons, the Society offers opportunity for a high form of public service. The Journal of the Society is in the nature of an open forum; contributors are not asked to subscribe to any creed. The Journal is sent free to all who are interested. For those who desire more than passive participation there is an active membership, with dues of five dollars a year, and a sustaining membership for those who place a higher estimate upon their responsibility.